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United States
Circuit Court of Appeals
For the Ninth Circuit

GOLD HUNTER MINING & SMELTING COMPANY, Plaintiff in Error.

vs.

EDWARD JOHNSON, Defendant in Error.

At Law

Brief of Plaintiff in Error

Upon Writ of Error from the United States District Court for the District of Idaho,

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STATEMENT OF THE CASE.

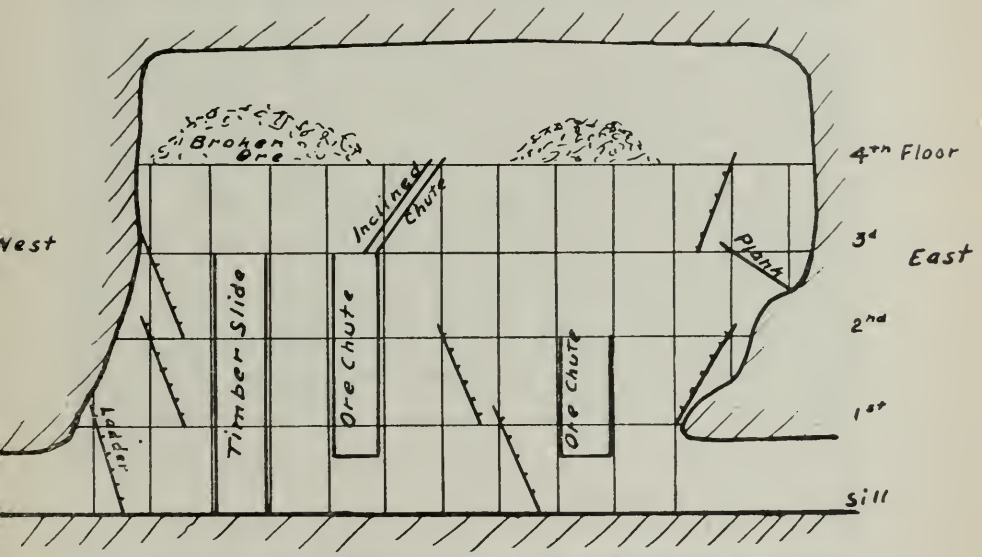
The defendant in error (hereafter called the plaintiff) brought this action against plaintiff in error (hereafter called the defendant) to recover damages for personal injuries suffered while an employee in the defendant's mine near Mullan in Shoshone County, Idaho. Judgment was recovered for the sum of $10,000 and defendant brings the case to this court on writ of error.

The plaintiff alleged in his amended complaint that on the night of October 17, 1914, he was working for the defendant in the Gold Hunter Mine as a machine man; that he was on that night sent to work on the fourth floor of the west stope of the 400 foot level of the mine, and that about two hours after he went to work his machine

drill began to leak air, and that thereupon he took down the drill intending to carry the same to the 400 foot level and thence to the main station in the mine on a higher level and exchange it for another drill; that in going from the fourth floor of the 400 foot level he proceeded to a man way near the east end of the stope, carrying his drill with him, went down the ladder in the east man way from the fourth floor to the third floor, then attempted to pass over a plank or lagging which was laid from the cap on the third floor to a bench or ledge of rock at the face of the stope, and, while walking upon this plank and carrying his drill, he either slipped or the plank to move slightly, causing the plaintiff to fall from the plank downward a distance of some 20 feet with the machine drill on top of him, and causing severe injuries. The plaintiff in his complaint alleged that there was another manway near the west end of this stope, but attempted to explain the reason for his not using this west manway by alleging that having descended from the fourth floor to the third floor by means of the ladder provided for such purposes, he could not reach the west manway, which was admittedly in perfect order, except by passing by an ore chute, a timber slide and an inclined chute, and it was the claim of the plaintiff in his complaint that this slide and these chutes occupied all of the space between the two walls of the stope on the third floor, and that there was not enough room for a man to pass by these objects.

In order that this court may clearly understand the conditions existing in this stope on the night of plaintiff's

accident, and the manner in which plaintiff received his injuries, we insert here a diagram, which represents the west stope of the 400 foot level of this mine, shows the four floors, the two manways, one in the east end and the other in the west end, the ore chute, inclined chute and timber slide as they existed on the night of plaintiff's injury, and the plank from which the plaintiff fell.



SCALE: ONE INCH EQUALS TWENTY FEET.

As before stated, this accident occurred in what was known as the west stope of the 400 foot level of the mine. This stope was approximately sixty feet in length. It had been opened and worked up to and including the third floor and Johnson was engaged in work upon the fourth floor on the night of the accident. The stope was provided with two manways, one of which has been called in the transcript the west manway, and the other one the east manway. The west manway had been extended from the sill floor, or level, to the third floor and was provided with ladders, which were admittedly in good condition on

the night of the accident. (90). There was also what has been called in the transcript the east manway, which extended from the sill floor to the fourth floor.

This so-called east manway was not a permanent manway (126) but was only used temporarily while a given floor was being opened up, and as soon as such floor was opened up it was the custom to then extend the west manway upward and to provide the same with proper ladders; the east manway was merely for the convenience of laborers whose duty required them to attend the ore chute near the east end of the stope. (131). These two manways were about forty feet apart one from the other. (99). Extending from the first to the third floor, and between these two manways, was an ore chute and a timber slide, and from the ore chute on the third floor to the fourth floor there had been constructed an inclined chute into which rock, ore, etc., was shoveled as it was taken from the fourth floor. The position of these several objects is shown upno the plat.

Four night before Johnson's accident the ladder in the so-called east manway extending from the second floor to the third floor was broken, although still passable (54); on the third night before the accident the ladder was broken and had become partially covered with rock but was still in such condition that it could be used and was used by Johnson in going to and from his work (78). But on the night preceding his accident the plaintiff testified that the ladder had been broken into pieces and was so covered by rock that it could not be used, and that for that reason he went to the east end of the stope on the

second floor and from thence to the third floor by means of walking on a ledge of rock to perhaps one-half the distance between the two floors, and then across the plank which we have mentioned and which was laid from this ledge of rock to the cap on the third floor (78). This plank was an ordinary lagging six feet long, eight inches wide and three inches thick (60-70) and the end which rested upon the cap of the third floor was between two and a half and three feet higher than the end which rested on the ledge of rock (70). It was alleged in the complaint that Johnson could not use the west manway for the reason that in order to do so, he would have to traverse the third floor, pass the timber slide, ore chute and inclined chute and that there was not sufficient room for a man to pass beside these on account of the fact that the ore chute and timber slide and inclined chute occupied all of the space between the two walls of the stope at that point. (21).

It was charged in the complaint that the defendant had failed in the discharge of its duties to furnish its employees with a reasonably safe place to work, by reason of the fact that it had failed to repair or replace the ladder in the east manway between the second and third floors, necessitating the use of this plank as a means of going from the second to the third floor (25); that it had failed to securely fasten this plank and had permitted the same to become wet and slippery; that it had failed to timber out to the face of the stope underneath this plank and had failed to provide any other means by which the employee could go to and from his work on the fourth

floor, it being alleged that it was impossible to use the west manway on account of the existence of the ore chute and timber slide.

It was not contended that any of these conditions, upon which the several charges of negligence were predicated, were unknown to or not fully appreciated by the plaintiff, but it was alleged in the complaint that he had notified the shift boss under whom he worked of this broken ladder and had been instructed by this shift boss to use the plank until a new ladder was provided and that the shift boss had promised to immediately replace the broken ladder. (par. VI., p. 23).

The defendant by its answer admitted the nature and extent of the plaintiff's injuries. (39). It contended that the so-called east manway was not a permanent manway, but was constructed for use of the miners to permit them to get to the chute near the east manway for the purpose of cleaning the same; it alleged that defendant had furnished its employees with a safe manway provided with proper ladders near the west end of the stope, and that the only proper way for the plaintiff to have descended from the place where he was working on the fourth floor to the sill floor, on the night of his accident, was to use the ladder at the east end of the stope from the fourth floor to the third floor, then travel along the third floor, passing the timber slide, ore chute and inclined chute, to the west manway, and descend by means of this manway upon the ladders therein provided; defendant also alleged that it had no knowledge of the existence of this plank until after the accident, defendant denying that plaintiff

had ever notified the shift boss of the existence of the same or made any complaint to such shift boss whatsoever. (32). And the defendant alleged that it had provided a rope and windlass in the timber slide for the purpose of sending machines, steel and other objects up and down between floors, and that the plaintiff should have used this timber slide in sending down his machine rather than to have carried the same. The defendant also set up the defenses of contributory negligence and assumption of risk.

Upon the trial it was proven that the plaintiff was a man 33 years old (73); had worked in the Hunter mine for about four years (74); he had worked in the west stope of the four hundred foot level where the accident occurred for three or four weeks (89); and on all the floors of this stope (90); he had helped open the first, second and third floors in the west stope on the four hundred foot level (90). It was the custom in this mine to open the stopes from the west end and as soon as the rock, ore, etc., had been taken down sufficiently to permit of doing so, the west manway would be extended upward to the floor which was being worked and a ladder then put in the manway (90); and the reason that the west manway had not on the night of the accident been extended from the third floor to the fourth floor was because of the fact that the rock and earth and ore had not been taken down sufficiently to permit of the extension of the west manway at that time. (126). The plaintiff, however, knew of the existence of this west manway, and had gone up and down the same (91). Johnson had also walked on the third floor between

the east and west manways and knew that there was sufficient room to pass the ore chute and had used this way in going to the fourth floor (97). Holmi, the plaintiff's only witness, also knew of this west manway and had used the same as a means of getting to the fourth floor (66), and in doing so had passed the ore chute and inclined chute on the third floor (67-68). And the plaintiff also knew of the existence of this windlass in the timber slide as a means of hoisting machinery, drills, etc., (92). Shaw, the shift boss, a witness for the defendant, passed the ore chute, inclined chute and timber slide on the third floor without difficulty after plaintiff's accident but on the same night (122-123-136) and there was no danger in going this way (143); Lamberton, another of defendant's witnesses had gone past these alleged obstructions on the third floor the night before the accident (150) and says even a man carrying a machine drill would have no difficulty in getting by (152-160); Pellecier, another witness for the defendant went this same way without difficulty and without danger (158-159-160) and on the same night of Johnson's injury he passed the chute and slides on the third floor (164); and Ashland, the machine man who took Johnson's place after his injury went this same way (168.)

So far as the evidence discloses, neither Johnson nor Holmi had attempted to pass these alleged obstructions on the third floor on the night of the accident, or on the night before, and were simply speculating when they intimate that it was not a practical way to go from the fourth floor to the sill floor in this manner. In fact, Holmi does not testify that it was impossible to go this way but merely

that he didn't think a man carrying a drill could get by the ore chute and inclined chute on the third floor (56).

It was Johnson himself who found this plank (96); he did not examine the same but began using it the night before his accident. And it was he who told Holmi of its existence (65). He used it on the night preceding his accident (65). But plaintiff sought to avoid the charge that he had assumed the obvious risk of passing over this plank carrying his drill by detailing a conversation between himself and Shaw, the shift boss, which he says occurred on the night preceding his accident. (80-81). The substance of this conversation was that Shaw came up to the place where plaintiff was working and asked him how he got up; that plaintiff replied that it was hard to get up and that it would be better to get a ladder and that thereupon Shaw told him that he would have the timberman put a ladder in. Upon which conversation the plaintiff bases the allegation of his complaint that he had notified the master of the existence of this broken ladder and of the fact that he was required to use this plank in going to and from his work, and the allegation of a promise on the part of the master to remedy this condition. (79-80).

The shift boss denies this conversation (129-130), and alleges that he did not even know of the existence of this plank prior to the accident to Johnson (120-130) nor who put the plank in (144). He testified further that there was at least two feet of space in which to walk by the ore chute on the third floor (136) and no danger in going so. (143).

It was also shown that the ladder which had been broken was not as a matter of fact, a part of any manway; the plaintiff says he did not know whether the broken ladder was a part of a regular manway or not (90), but the evidence of defendant's witnesses is clearly to the effect that this was not a regular manway (112-126-146), and that the only mayway which the men were expected to use was the manway near the west end of the stope.

As before stated, it was also chargd as negligence for the defendant to have left the floors beneath this plank untimbered. It was shown, however, that the reason for this was that it is a custom, not only in this mine, but in others as well, to run a sufficient distance to put in a set of timbers before doing any timbering (121); these sets are placed six feet apart and the only place untimbered on the night of the accident was the short distance from the last set of timbers to the face of the stope, and less than the distance between two sets of timbers (121).

Summarizing then, the issues in this case, it will be observed that defendant is charged with being negligent in that it had not provided a ladder in the so-called east manway between the second and third floors, necessitating the use of this plank; and that it had not timbered beneath this plank. Plaintiff knew the danger to which he was subjected by the use of such plank, but claims a suspension of the doctrine of the assumption of risk on account of an alleged promise of the master to remedy the danger.

Defendant on the other hand explains the reason that it had not timbered clear to the face of the stope

by the fact that work had not been carried on far enough in that direction to permit of the putting in of a set of timbers; denies any knowledge of the existence of this plank prior to plaintiff's injury, denies any promise to remove any danger known to it, and asserted that it had provided another perfectly safe way for plaintiff to go to and from his work on the fourth floor by means of the west manway.

SPECIFICATIONS OF ERROR.

I.

The defendant assigns the following errors:

The court erred in denying defendant's motion for a directed verdict and in refusing to instruct the jury to return a verdict in favor of the defendant at the close of the evidence for the following reasons, to-wit:

1. Because it appeared from all the evidence adduced in this case that there was no actionable negligence on the part of the defendant which was the proximate cause of the injury complained of in plaintiff's complaint and in this case.

2. Because it appeared by the evidence that plaintiff knew and appreciated the risk to which he was subjected at the time of his injury, and that plaintiff therefore, assumed such risk, and that his injury resulted from an assumed risk.

3. Because it appeared by the evidence that the plaintiff at the time of his injury was guilty of contributory negligence in passing along a way which he knew to be

defective and dangerous, and that plaintiff's injury resulted from his own contributory negligence.

4. Because it appeared from the evidence that if the place where the plaintiff was injured was unsafe, that such place had been rendered unsafe by the act of a fellow servant.

5. Because it appeared from plaintiff's complaint and the evidence adduced in this case that the only act of negligence charged against this defendant was the failure to repair a ladder between the second and third floors, and that such failure on the part of the defendant was not the proximate cause of the plaintiff's injury.

6. Because it appears that the plaintiff was injured while passing along an unsafe way which he had adopted, uninfluenced by any act of the defendant rather than to pass along a safe way which had been provided by the defendant, and was therefore guilty of contributory negligence at the time of his injury.

7. Because of the insufficiency of the evidence to sustain any verdict or judgment in favor of the plaintiff, for the following reasons, to-wit:

(a) There is no evidence of any negligence on the part of the defendant which was the proximate cause of the injury to the plaintiff. While the evidence does disclose the fact that a short time prior to plaintiff's accident one of the ladder leading from the third to the second floor of the stope where plaintiff was working had been broken, it does not appear that this condition was known to the defendant, or could have been known by a reason-

able inspection, nor does it appear from the evidence that the defective condition of this ladder was the proximate cause of plaintiff's injury, and it does appear from the evidence that there was another safe way known to the plaintiff by which he could safely descend from the third floor to the second floor, and the evidence further discloses that the proximate cause of plaintiff's injury was the fact that he selected a way of descending from the third floor to the second floor which he knew or believed to be unsafe and defective, and by which route he was not obliged or required to descend, and which unsafe way had been provided by the act of a fellow servant.

(b). The evidence discloses that the proximate cause of the plaintiff's injury was the negligence of a fellow servant or servants. In this respect the evidence shows that the plank or lagging upon which the plaintiff was attempting to cross at the time of his injury was used by the plaintiff and other employees after the ladder between the second and third floors had been broken; the chief witness for the plaintiff (John Holmi) testified that he was first told of the existence of this plank or lagging by either the plaintiff or another of his fellow workmen. In the absence of any proof that this way had been provided by the defendant as a means of going from the third to the second floor, or vice versa, it must be assumed that it was simply a means provided and adopted by the employees themselves as an easy mode of travel between these floors.

(c). The evidence discloses that the plaintiff negligently placed himself in an obviously dangerous position, name-

ly, upon the plank or lagging beneath which there were two open floors; the evidence shows that the plaintiff himself knew or believed this to be a dangerous position; and the evidence further shows that plaintiff need not have placed himself in such position but could have descended by another and safer route; the evidence further shows that whatever dangers were attendant upon walking over this inclined plank or lagging were open, obvious and as well known, understood and appreciated by the plaintiff as they could possibly have been by the defendant, and that in choosing and electing to go by such obviously dangerous route the plaintiff was guilty of negligence per se and assumed the risk as a matter of law.

(d). And for the same reason and in the same particulars as mentioned in the foregoing specifications (c) the plaintiff was guilty of gross contributory negligence in attempting to pass over said plank or lagging.

II.

The court erred in refusing to instruct the jury as requested by defendant's instruction numbered 1, which was as follows, to-wit:

> "I instruct you that where a person injured seeks to recover on the ground that the employer has promised to repair, he must show that in doing what he did or subjecting himself to the danger that he could not foresee or anticipate the injury and that there was no other reasonable or equally safe way of going than the way he went. And if you should believe in this case that there was another way provided,

which was the method usually provided in such mines for employees going from one floor to the other, and that the plaintiff could have gone that way on the night he was injured, then I instruct you that he would not have been justified in taking a more dangerous way if it was not the usual way provided by the employer and that any promise of providing another way would not furnish him a justification for subjecting himself to an additional danger."

III.

The court erred in refusing to instruct the jury as requested by defendant's instruction numbered 2, which was as follows, to-wit:

"An employee who knows and appreciates the hazard of his service and the risk which is apparent to ordinary observation assumes the risk incident to the same, and where the defect is as obvious and well known to the employee as to employer, the employee assumes the risk thereof as one of the ordinary risks of business or employment. If, in the case now before you, you believe that the defect or danger was one which the plaintiff knew and appreciated, as well as the employer, then it was such a risk as an employee assumes."

IV.

The court erred in giving the following portion of his oral instructions to the jury, to-wit:

"Some of you were upon the jury that tried the

last case, and you heard the instructions that were given them. The principles of law are in a great many respects the same in this case as they were in that. But in some respects there are different features, and some of you were not upon that jury, and hence I shall instruct you fully in this case, and those of you who were in the other case will lay aside any recollection that you may have of what was said in that case."

V.

The court erred in giving the following portion of his oral instructions to the jury to-wit:

"Even though you should find that the defendant was negligent, even though you should find that the plaintiff was negligent, he might still be debarred from recovering under the rule commonly referred to as the assumption of risk by an employee. I will explain that to you in this way. If one, being in the employ of another, uses a tool or piece of machinery which is defective, or works in a place which is dangerous, and he, the employee, knows of the defect or the dangerous condition, and, by reason of his age and intelligence and experience, is able to appreciate the peril of using such defective device or machine, or the peril from such dangerous conditions, in the place where he works, then the general rule is that he impliedly agrees to take the chance, he relieves his employer from that chance. I explained that to you upon the other jury by the use

of a very familiar and simple device and perhaps it is as good an illustration as I can give you now. If one of you, being a farmer, employs a farm hand and, we will say, puts into his hands an axe or a pitchfork with a cracked handle, and the employee knows nothing about it, and uses the device, ignorant of the weakness of the handle, and is injured as a consequence, then the employer is held responsible for his negligence in not furnishing him with a reasonably safe device; but if, upon placing such axe or pitchfork in the hands of his employee, he calls his attention to it, and the employee is able to appreciate, as is the employer, the danger of using a pitchfork or axe in that condition, then if he goes on and uses it, he can make no complaint if he sustains injury, because he impliedly agrees to take the chance.

VI.

The court erred in giving the following portion of his oral instruction to the jury, to-wit:

> "The plaintiff cannot recover unless the defendant was negligent, and unless such negligence contributed to or caused the accident."

ARGUMENT.

The plaintiff in this case was a miner thirty-three years old, had had ten years' experience in underground quartz mining, four years of which time he had worked in the defendant's mine; he was familiar with the west stope,

where the accident occurred, had been one of the few men engaged in the work of opening the first four floors of this stope, he knew the existence of the west manway, the location of the ladders therein and their condition; he knew the location and position of the timber slide, ore slide, and inclined chute or rock slide as it has been called in the evidence; he was the first man shown to have known of the existence of this plank, and the fact that it was being used in lieu of a ladder between the second and third floors, was one of the few men to use the plank, and told his fellow-workmen of its existence. Every defect and every condition existing in the place where he was required to work, and upon which the several charges of negligence in this case are predicated were known to the plaintiff; he knew of the broken ladder between the second and third floors in the east manway, and had used this ladder in its broken condition for two nights; he had used the plank for two nights before there is any claim that he complained of these conditions; he knew by what means the west manway was accessible to a workman whose labors called him east of the ore chute, timber slide and rock slide. And if the west manway was inaccessible by reason of it being impossible for a person to pass beside the timber slide, ore chute and rock slide on the third floor, this fact was also known to the plaintiff; he knew also, and when he used the plank could plainly see, its size and its condition as to being wet and slippery, and the fact that there was no timbering beneath the same; all of these defective or dangerous conditions were obvious to a casual inspection and were known to the plaintiff at least two

days, if not three or four days before his accident, and whatever dangers there were arising from the defendant's failure, if there was a failure, to discharge its duties towards the plaintiff, were at all times apparent, required no warning from the master, and were of such a character that they must have been known and appreciated by the plaintiff. There was nothing hidden about the dangers; they were plain, open and apparent, and it is not claimed otherwise.

We contend therefore that the plaintiff is barred of any right of recovery in this case as a matter of law for the following reasons:

I. For the reason that every defect or condition or danger of which the plaintiff complains was open, obvious, known to and appreciated by the plaintiff, and that he therefore assumed the risk. (Assignment of Error, Nos. 1-2, 1-7-c).

II. For the reason that the alleged conversation between the plaintiff and the shift boss was insufficient to constitute a complaint of the defect or condition which plaintiff considered dangerous to himself, but was simply a complaint of an inconvenience, or a condition rendering his going to and from his work more difficult, unaccompanied by any statement of the servant's from which it could reasonably be inferred that he intended to quit the employment if the danger was not removed.

III. For the reason that the alleged promise to remove such danger was insufficient to relieve plaintiff of the assumption of risk, but was merely a casual remark of the

shift boss, made without reference to any complaint of the servant, and did not constitute a promise to repair a defect or remove a danger.

IV. For the reason that there is an entire absence of any testimony from which it could reasonably be inferred that the plaintiff was induced to continue in the employ of the defendant by reason of any promise or statement of the master.

V. For the reason that the accident to the plaintiff occurred after the expiration of a reasonable time within which to provide the ladder in the east manway by reason of the absence of which plaintiff asserts he was injured.

VI. For the reason that the doctrine that a promise to repair a defect or remove a danger, relied on by a servant, relieves the servant of the assumption of risk, does not apply to cases where the servant is engaged in ordinary labor or the tools used are only those of simple construction with which the servant is as familiar as the master.

VII. For the reason that there is an entire absence of any proof of any negligence on the part of the defendant which was the proximate cause of plaintiff's injury. (Assignment of Error Nos. 1-5).

VIII. For the reason that the plaintiff was guilty of contributory negligence as a matter of law (1) in continuing to use an instrumentality the danger from the use of which was imminent and such as no prudent man would consent to incur, and, (2), because at the time of the injury to the plaintiff he was using a way which was dangerous

in preference to a safe and convenient way provided by the master, and, (3), because at the time of plaintiff's accident he was guilty of negligence in attempting to descend said plank while carrying a weighty drill, and, (4), for the reason that the plaintiff in attempting to walk across this plank carrying a heavy drill did not use the degree of care commensurate with the increased risk of which he had full knowledge. (Assignment of Error, Nos. 1-3, 1-6).

I. THE PLAINTIFF ASSUMED THE RISK OF WALKING OVER THIS PLANK, CARRYING HIS DRILL, AND HAVING ASSUMED THE RISK IS PRECLUDED FROM A RECOVERY IN THIS CASE.

The general rule as to the assumption of risk is stated by Mr. Labatt (Volume 4, Section 1313, Labatt's Master & Servant), to be that an adult of ordinary intelligence is presumed to have been capable of ascertaining every fact which could have been apprehended by the senses of a person having the same opportunities as he had of exercising those senses in relation to the dangerous conditions which caused the injury. And in the foot note to the section we have just mentioned the author has collected and cited numerous cases in support of this general proposition.

This is the effect, also, of the decisions of this court. And in the comparatively late case of Williams vs. Bunker Hill & Sullivan, 200 Federal 211, where it was held that the laborer had not assumed the risk of the condition through which he suffered an injury, this court did not depart

from the general rule but rather adhered to the same and said in the course of the opinion at page 214:

> "Of course, an employee who knows and appreciates the hazards of his service, and those risks which are apparent to ordinary observation, assumes those risks incident to his situation. Neither do we lose thought of the established rule that when a defect is obvious, or so patent as to be readily observed by a servant by the reasonable use of his senses, having in view his age, intelligence, and experience, and the danger and risk from it are apparent, the servant will not be heard to say that he did not realize or appreciate them."

The general rule that a servant assumes the risk of defects and dangers which are open and obvious to him is well established in the Federal Courts.

> Burke vs. Union Coal & Coke Company, 157 Federal 178,
>
> Southern Railway Company vs. Lyons, 169 Federal 557,
>
> Union Consolidated Mining Company vs. Bateman, 176 Federal 57,
>
> Chicago B. & Q. R. Company vs. Shalstrom, 195 Federal 725.

It is needless to refer the court to the many cases upholding this general doctrine, for we firmly believe that neither the plaintiff nor his counsel would contend for one

moment that plaintiff could recover under the facts in this case, in the absence of any notification or complaint to the master of the alleged dangerous conditions through which he suffered his injuries. And believing that the only basis upon which it can seriously be contended that plaintiff can maintain his action for his injuries must be based upon his alleged complaint to the shift boss and the latter's promise to put in a new ladder, we proceed to a consideration of the sufficiency of such complaint and promise.

II. THE COMPLAINT OF THE SERVANT TO THE SHIFT BOSS WAS INSUFFICIENT.

In order to relieve the servant from assumption of risks or defects which are obvious, open and known to and appreciated by such servant, by a promise of the master to repair the defect or remove the danger, it is necessary for the plaintiff to allege and prove: First, that there was a complaint made to the master of a defect or danger which the servant considered dangerous to himself, and which the servant is unwilling to assume and that he intends to quit the employment unless such defect is remedied or such danger removed; second, that the master promised to remedy the defect or remove the danger; and third that the servant continued in the employment because of his reliance on the promise of the master, and that such promise was the inducement for the servant continuing in the employment.

4 Labatt's Master & Servant, Section 1342.

2 Cooley on Torts, p. 1156.

26 Cyc. p. 1208 (2-c).

The only evidence of a complaint of the servant in this case or of a promise to change conditions, and in fact the only reference to such a complaint or promise, is found on pages 80 and 81 of the record, and consisted of the following colloquy between Shaw, the shift boss, and the plaintiff:

> Shaw came up, and he said, "this is like a whore house; a man can't get up here no way;" he said, "How did you get up here?" And I said, "It is pretty hard to get up here; you have to go like a rabbit on the timbers here, but you better get a ladder here," and he said, "Yes, I get the timber men to put them ladder over there; I get the timber men to put the ladder over there." (80).
>
> The night before I get hurt. He said, "You go that way now, on the plank, so long as the timber men come up here. I get the timber men up here as quick as I can to put that ladder there." (80).
>
> Q. Was there anything else said about ladders?
>
> A. No. He said he go and fix that. He said he give the foreman orders already, the day before, that he sent the ladder in, you know, that he gave orders to make the ladder and send in the ladder." (81).

The plaintiff in this case knew of the broken condition of the ladder between the second and third floors and of the existence and use of this plank as a means of going from the second to the third floor; he had used this mode of

going to and from his work for two or three days before his accident; he does not testify that he ever considered it dangerous to use such plank, but if there was any risk in walking over this plank the danger of doing so must have been known and appreciated by the plaintiff. So far as the evidence discloses he never made an effort to notify the master of this condition after he ascertained that the ladder had been broken, but went on working, and waited for the chance conversation with Shaw on the night preceding his accident. He did not even then complain to Shaw of the broken ladder, nor of the fact that servants were compelled to use this plank on account of such broken ladder. The conversation was opened by Shaw, himself, and there is nothing in the entire conversation between the servant and the shift boss which indicates that either one of them considered the use of this plank dangerous. On the contrary, it is apparent that both parties referred only to the inconvenience of the servant having to walk from the place where the ladder had been, to the end of the stope, and thence up to the next floor by means of the ledge of rock and the plank. We are familiar with the rule that the evidence of a complaint to the master should be liberally construed, but nevertheless there must be sufficient evidence of a notification or a complaint from which it may fairly be inferred that the servant was complaining of a dangerous condition,—was complaining on his own account of a condition which subjected him to an added danger, which he is unwilling to assume, and that he intends to quit the service unless such danger is removed or assumed by the master. The only notification or complaint

made to Shaw by the plaintiff was, "It is pretty hard to get up here; we have to go like a rabbit on the timbers here, but you better get a ladder here"; merely a complaint of an inconvenient means of going to and from his work,—a complaint of a condition which made it more difficult for the servant to go to and from his work.

It is stated in Volume 4, Labatt's Master and Servant, Section 1343, that the responsibility for a servant's injury will not be shifted to the master where the complaint is merely that a certain defect increases the difficulty of the work, or renders the performance of the servant's duty more inconvenient.

The case of St. Louis & S. F. R. Company vs. Mealman 97 Pacific, 381, is very much in point so far as the nature of the complaint of the servant and master's promise to repair on which the servant based his right to recover is concerned. The servant in that case had been using a hand car furnished by the railroad company upon which the brakes had become worn, defective and practically worthless. The complaint relied upon consisted of a conversation between the foreman and the servant in which the servant advised the foreman of the condition of the brakes, telling him that they were out of order and worthless, and needed repairing; the foreman ordered the servant to go ahead and use the car, and that he would fix it or have it fixed. And the servant in that case testified that he continued to work only because of the promise of the foreman to have the car repaired. Nevertheless, the promise in that case was held to be absolutely insufficient to relieve the servant from assuming the risk, on account

of the fact that there was nothing in the complaint to indicate that the servant apprehended a danger from the use of the car; his evidence on the contrary indicating that he complained of the condition of such hand car as a matter of convenience in handling the car, and that he did not continue in the service on account of the promise of the foreman to have the same repaired.

And in Gowen vs. Harley (C. C. A. 8th Circuit) 56 Fed., 973, where it was the servant's duty to move a box weighing 250 pounds a distance of five feet from one railroad car to another, and where the servant had asked for and been promised skids whereon to slide the box, such being a more convenient way of moving the same, it was held that this complaint and promise to furnish skids did not relieve the servant from assuming the risk of moving such box in the ordinary way, because of the fact that the complaint was made and the skids asked for merely because it would be easier for the servant to move the box by this means than in the manner in which he had been doing so. And the court said in that case, speaking through Justice Sanborn, "A servant who is employed to perform a simple act of manual labor, the risks of which are obvious, cannot escape from his assumption of those risks by proof that the master promised to furnish him tools by the use of which his work could be done in a different way, or more conveniently, or even more safely, if it could be done with reasonable safety without the tools."

So in the case of Texas & P. Ry. Company vs. Nichols, 92 S. W. 411, where a depot employee had complained of the

slippery condition of the platform not because of any apprehension of danger, but merely for the comfort of himself and others it was held that he could not escape from assuming the risk therefrom because of such complaint.

And in Lewis vs. New York & New England R. Co., 153 Mass. 73, 23 N. E. 431, 10 L. R. A. 513, where a pier upon which the servant was required to walk had become obviously decayed and the servant had complained to the master of its condition, saying that some one was going to get hurt, that several people had already fallen through and if left in its decayed condition somebody was going to get badly injured, and the master had promised that he would have carpenters overhaul and repair the pier as soon as they could get to it, the complaint was held insufficient, and the servant was held to have assumed the risk of his continuance in the employment and use of this pier, the decision being based partially upon the insufficiency of the complaint but also upon the lack of any evidence showing or attempting to show that plaintiff's continuance in the employment was induced by a promise to repair.

And in Balle vs. Detroit Leather Company, 41 N. W. 216, where the servant was killed by falling into a vat in a tannery, presumably stumbling over a box near such vat, and where the only complaint was that this box was in his way, it was held that this complaint and promise of the master to change the condition did not relieve him from assuming the risk.

There is absolutely nothing in the conversation between the plaintiff and the shift boss from which it could rea-

sonably be inferred that either the servant or the shift boss anticipated any danger whatsoever from the use of this plank. The plaintiff, himself, had a more intimate knowledge of conditions in the west stope than any employee of the defendant,—more intimate doubtless than the knowledge of the master himself. He had known of this broken ladder and of the use of this plank for several days and had made no complaint, and had not even notified the master of this condition. His conversation with Shaw was merely a casual one with reference to an inconvenient and difficult way of going to and from his work.

Neither is there anything in this conversation from which it could fairly be inferred that the servant had any intention whatsover of leaving the defendant's employ on account of this broken ladder unless the master would put in a new ladder or agree to assume the risk until such new ladder was provided. And there must always be some evidence from which it can reasonably be inferred that the servant is complaining of a danger threatening him, which he is unwilling to assume and that he intends to quit the employment unless such danger is removed.

Morden Frog & Crossings Works vs. Fries, 81 N. E. 862.

Myhra vs. Chicago M. & P. Ry. Co., 112 Pac. 939.

In both of the above cases the evidence of an intention to quit the service was held sufficient but the rule that such evidence is necessary is clearly stated.

In the present case the servant had worked several

days under identically the same conditions and without complaint and there is nothing to indicate that it had ever occurred to him to complain of the broken ladder and of this plank as a danger, or that it had ever entered his mind that he would not continue in the defendant's employ unless there was a change of conditions.

III. THE ALLEGED PROMISE OF THE SHIFT BOSS WAS INSUFFICIENT TO RELIEVE PLAINTIFF OF THE ASSUMPTION OF THE RISK INCIDENT TO THE USE OF THIS PLANK.

In order for the promise of the master to be sufficient to relieve the servant of the assumption of an obvious risk it must be of such a nature that the jury can reasonably infer that the master, in recognition of the existence of some dangerous condition, as an inducement for the continuance of the servant in the employment agreed to assume the risk until such time as the master can make good his promise to repair the defect or remove the dangerous condition. We do not contend for one moment that an express promise is necessary, but there must be some evidence from which the jury can infer that a condition known to both the master and servant to be dangerous had arisen, and that the master had promised to remove such danger in order to induce the servant to continue in his employ.

There is nothing in the evidence in this case which we have already quoted, from which a jury could infer that Shaw's statement that he was going to have the timbermen put a ladder in the east manway was made because

of any complaint that the plaintiff had made, or as an inducement to the plaintiff to continue in the employ. The plaintiff had known of this condition, several days; according to the testimony of the plaintiff, Shaw had ascertained it on the night of this conversation and without any complaint, but simply because of a knowledge on his part that the ladder was broken, he made the casual statement that he intended to have the timbermen put in a ladder. It is well to remember at all times when speaking of this conversation between Shaw and the shift boss that Shaw flatly denies that any such conversation ever occurred. (129-130). And even the statements accredited to Shaw by plaintiff's testimony do not indicate that Shaw's expressed intention of putting in a ladder had any reference to the protection of plaintiff or to the servants or that it was anything more than a promise to provide a more convenient way of going between the second and third floors.

Somewhat similar promises to change existing conditions were held to be insufficient in Industrial Lumber Company vs. Johnson, 55 S. W. 362, where the brakeman complained of pulling derailed cars because of a defective draw head and the defendant's agent then told the carpenter to fix the drawhead immediately, and the plaintiff continuing to use it with knowledge of its defective condition was injured and it was held that the instructions of the agent to repair the drawhead were intended to facilitate the master's business and not for the employee's protection, and was not such a promise to repair as would relieve the plaintiff from the assumption of the risk of

using it, and Gulf C. & S. F. Ry. Company vs. Garren, 74 S. W. 897, where a locomotive fireman was injured in attempting to use a defective engine step, the defect in which had been noticed by both himself and the engineer, and the engineer after having tried to fix the step himself, told the fireman that he would have it fixed and it was held that this promise to have the step fixed was insufficient to relieve the fireman of assuming the risk and using the defective step. It will be noticed in the latter case that the promise is practically the same as in the present case. Without any complaint about the use of this plank, necessitated by such broken ladder, as dangerous, Shaw volunteered to have a new ladder put in the east manway; his promise to do so was not actuated by any idea on his part or on the part of the plaintiff that a dangerous condition had arisen and was not made as an inducement to the plaintiff to continue in the employ, but was only a casual statement of the shift boss.

IV. PLAINTIFF WAS NOT INDUCED TO REMAIN IN DEFENDANT'S EMPLOY BY A PROMISE TO REPAIR A DEFECT OR REMOVE A DANGER.

The evidence in this case is absolutely silent upon the question of the plaintiff being induced to continue in the employ of the defendant by reason of any promise to place a ladder between the second and third floors in the east end of the stope. The plaintiff himself could best have told whether or not he continued in the employ by reason of his conversation with Shaw, but he does not claim that this conversation influenced him in any degree whatsoever so far as his continuance in the employ

of the defendant was concerned. That such promise would not have this result is amply established by the fact that plaintiff, who was more familiar with conditions in the west stope from the sill floor up to the fourth floor than any one in the defendant's employ, had known of this broken ladder for at least four nights before his accident, and had never complained or even notified the master of its broken condition, nor of the use of this plank, but had used the plank without complaint. There is nothing in the evidence to indicate that his use of the plank after his conversation with Shaw was different in any manner, or induced by different considerations, or prompted by different reasons, than his use of the same before his conversation with Shaw. There is nothing in his evidence to indicate, or from which a jury could possibly infer, that he would not have continued in the employ of the defendant, or that he would not have continued to use this plank, if it had not been for the promise of Shaw.

It is absolutely essential in every case where a servant is injured through obvious defects or conditions and seeks to recover by reason of his complaint and a promise to repair, that he shall affirmatively establish the fact that he was induced to continue to labor under such dangerous conditions, or use such defective machinery or instrumentalities, by reason of the master's promise and by reason of his reliance thereon.

In 26 Cyc. page 1212, sub-division (4), the rule is stated as follows:

"In order that a servant may be relieved from the

operation of the doctrine of assumed risk from a defect complained of and the danger of which he was no longer willing to incur, it is essential that his remaining in the employment was induced by the promise of the master to remedy the defect, when he would not otherwise have done so."

And in 4 Labatt's Master and Servant, Section 1345, the rule is thus stated:

"After the servant has shown that there has been a promise, actual or implied, on the part of the master, and that this promise amounts to an undertaking to remove not only a danger, but a danger by which he himself is threatened, he still has the onus of proving that the inducing motive of his continuance in the employment was his reliance upon the fulfillment of the promise.

In Bodwell vs. Nashua Mfg. Company, 47 Atl., 613, the servant was injured by catching his foot on a pile of planks, his view of which was obstructed by the escape of steam from a pipe nearby, complaint of which pipe had been made and a promise made by the master to repair the same. It was held that there could be no recovery since there was no evidence to show that the servant relied on this promise to repair, or that he would have quit the employment except for such promise.

In Showalter vs. Fairbanks, Morse & Company, 60 N. W. 257, the master had promised to remove a danger but the servant had continued in the employment, not so much relying on such promise as on assurances of the

master that there was in fact no danger, and the Supreme Court of Wisconsin held in that case, that the servant assumed the risk on account of the fact that it was not shown that he had continued in the employment relying on the master's promise to remove the danger. The court called attention to the fact that there was no evidence that the servant had relied on the promise to remove the danger and said "there must be reliance on the promise to repair, in order to make such a promise of any avail as an excuse to the employee."

In Roy vs. Hodge, 66 Atl. 123, the servant was injured by coming in contact with a bench saw while attempting to throw a piece of edging upon a pile of the same, which had been permitted to accumulate. About a week before the accident, and also on the day of the accident, the servant had complained of this accumulation of edging because he feared danger therefrom, and the master had promised through its superintendent that the danger would be removed as soon as he got around to it. The decision of the Supreme Court of New Hampshire is based entirely upon the ground that there was an entire lack of evidence to show that the plaintiff was induced to remain in the defendant's services by reason of the master's promise to remove the pile of edging.

And in Morden Frog & Crossings Works vs. Fries, 81 N. E. 862, it is expressly held that the right of a servant to recover for personal injuries upon a promise to repair, rests upon the fact that the servant is induced by such promise to continue in the employment, and that if the promise to remedy the defect did not induce the plaintiff

to remain in the service when he would otherwise have abandoned it, the promise would have no effect to create a new relation.

Where there is any evidence to indicate that the servant did continue in the employment because of such promise the question is of course for the jury; but where, as in the present action, there is an entire absence of any testimony upon this question, and it is on the contrary shown that the servant had continued with full knowledge of such conditions for several days before the alleged complaint, and nothing to indicate that his continuance in the employment after such alleged promise was induced by such promise, then the proof of the complaint and promise to repair, without showing a reliance upon said promise, as the inducement for the servant's continuance in the employment, is absolutely insufficient to support a verdict.

And this is the effect of the following mentioned decisions:

Louisville & N. R. Co. vs. Goodwin, 131 S. W. 1012.

American Tobacco Company vs. Adams, 125 S. W. 1067.

Harris vs. Bottum, 70 Atl. 560.

St. Louis & S. F. R. Co. vs. Mealman, 97 Pac. 381.

Jones vs. Walker County Lumber Co. 162 S. W. 420.

We have referred to only a small number of the cases upon this question; there might be many others cited to the court. In fact, the cases in which recovery has been permitted, based on a promise to repair a defect or remove a danger, have all rested upon the fact proven and established in such cases that the promise to repair furnished the inducement and the reason for the continuance of the servant in an employment which he otherwise and in the absence of such promise to repair would have instantly quit. This is the basis upon which recovery has been sustained by the Supreme Court of the United States where in the statement of the rule of law, the right to recover has always been predicated upon the reliance of a servant upon the promise to repair, the burden of proving which reliance is upon the servant. Southwestern Brewery & Ice Company vs. Schmidt, 226 U. S. 161, 57 Law Ed. 170, in which the rule is stated in the following language:

> "A master may remain liable for a certain time for a failure to use reasonable care in furnishing a safe place in which to work, notwithstanding the servant's appreciation of the danger, IF HE INDUCES THE SERVANT TO KEEP ON BY A PROMISE THAT THE SOURCE OF TROUBLE SHALL BE REMOVED."

Judge Cooley states the rule to be that:

> "If the servant, having a right to abandon the service because it is dangerous, refrains from doing so in consequence of assurances that the danger shall

be removed, the duty to remove the danger is manifest and imperative, and the master is not in the exercise of ordinary care unless or until he makes his assurances good." 2 Cooley on Torts, (Third Edition, page 1156).

V. PLAINTIFF ASSUMED THE RISK BY CONTINUING TO WORK AFTER THE EXPIRATION OF A REASONABLE TIME WITHIN WHICH TO REPLACE THE LADDER BETWEEN THE SECOND AND THIRD FLOORS.

But even where there has been a sufficient complaint of a dangerous condition and a promise to repair, the time within which the repairs are to be made, or the danger removed not being stated, the servant is relieved from assuming the risk only during such time as is reasonable for the master to make good his promise to repair the defect or remove the danger. And when after the expiration of a reasonable time the servant continues to work with the defective instrumentality, or under the dangerous condition complained of, he assumes the risk.

Mr. Labatt says, (Volume 4, Section 1349):

> "As soon as the period contemplated for the removal of the dangerous conditions terminated, the servant's position is precisely what it would have been if no promise had been given; that is to say, he reassumes the risk."

And in 26 Cyc. page 1212 (5), the rule is stated in the following language:

"If the servant remains in the employ longer than a reasonable time after the master's promise to repair the defect, he will be held to have assumed the risk.

"After a reasonable time has elapsed, or, if a definite time is fixed, then after that has expired, the risk is again upon the servant." 2 Cooley on Torts, page 1159.

And what is a reasonable time is to be determined by the time which might reasonably be required by the master in which to make the repairs. In the case at bar the repairs which the plaintiff says had been promised consisted merely of the putting in of a new ladder between the second and third floors. The plaintiff in his testimony (97-98) testified that the ladders were stock ladders of the uniform length of ten feet and were kept on the level of the mine ready to be taken to whatever point they were required, and that sometimes they were even kept in stock on different stations; he testifies that it would only take a few minutes to bring one of the ladders from whatever point they were kept in stock to the place where this ladder was to be put in the east manway. Yet the alleged promise to put in this new ladder was made more than twenty-four hours before plaintiff's accident. He had worked for four shifts while the ladder was broken without complaint, and even after his alleged complaint, and the alleged promise to replace the broken ladder with a new one, with full knowledge of the fact that it would only take a few minutes to replace this ladder, the plaintiff continued to work knowing that even if he

had considered the statement of Shaw as a promise to replace the ladder, that the promise had not been made good.

In Parker vs. Drakesboro Coal, Coke & Mining Company, 96 S. W. 575, it is said that:

> "If a master's promise to remedy a defect is not fulfilled in such time as would ordinarily and reasonably be required to remedy it, the servant by remaining in the employment, assumes the risk."

It is not sufficient in a case like this one to say that the question of what is a reasonable time is to be left to the jury, when the only testimony upon this question is the testimony of the plaintiff himself in which he shows that the promise to change conditions could have been made good in a few minutes time and was not lived up to for more than twenty-four hours after the promise, and then in view of a full knowledge on his part that the danger had not been removed, he continued to work.

VI. A PROMISE TO REPAIR DOES NOT RELIEVE THE SERVANT OF ASSUMING THE RISKS INCIDENT TO THE USE OF INSTRUMENTALITIES OF SIMPLE CONSTRUCTION.

But even if the plaintiff in the present action had proven a sufficient complaint of a danger which he believed threatened him in the use of this plank as a means of going from the second to the third floor, and even though he had established beyond the peradventure of a doubt that he was induced to continue in the master's employment because of the latter's promise to remove such dan-

ger, he is still held to have assumed the risk of using common instrumentalities the defects in which and the dangers from using which are obvious and open to him and appreciated by him.

In 26 Cyc. page 1209, it is said that the rule which relieves a servant from assuming obvious risks where there has been a promise to repair does not apply in the case of ordinary labor with common implements with which the servant is perfectly familiar. And in the well considered case of Gunning System vs. Lapointe, 72 N. E. 383, the Supreme Court of Illinois, stated the rule in the following language:

> "It is not in all cases that the servant may relieve himself from the assumption of the risk incident to defects and dangers of which he has full knowledge by exacting from the master a promise to repair. The cases where the rule of assumed risk is suspended, and the servant exempted from its application under a promise from the master to repair or cure the defect complained of, are those in which particular skill and experience are necessary to know and appreciate the defect and danger incident thereto, or where machinery and materials are used of which the servant can have little knowledge, and not those cases where the servant is engaged in ordinary labor, or the tools used are only those of simple constructions, with which the servant is as familiar and as fully understands as the master."

And to the same effect are the following authorities:

Musser-Sauntry Land, Logging & Mfg. Co. vs. Brown, 126 Fed. 141.

Marsh vs. Chickering, 5 N. E. 54, where the servant had notified the master that a ladder which he used in lighting gas lamps needed spiking and they had promised to repair it, but did not do so, and he was injured by reason of the slipping of the ladder, and it was held that the rule making the employer responsible for defective machinery, etc., does not extend to ordinary labor that requires the use of implements with which the employee is perfectly familiar.

Meador vs. Lake Shore & M. S. Ry. Company, 37 N. E. 721, which is also a case where the servant was injured while using a defective ladder after notification to the master of such defect, and a promise on the part of the master to furnish a new ladder, and in which the right of recovery was denied.

Webster Mfg. Company vs. Nesbitt, 68 N. E. 936, where a blacksmith was injured on account of the defective condition of a backing hammer, after a complaint and promise to repair, and where it was held that he could not recover.

Brewer vs. Tennessee Coal, Iron & Railway Company, 37 S. W. 549, where the servant was injured by falling from a trestle while walking on a plank which had become greatly worn, and where the servant had previously notified the master of the defect and was given a promise that the palnk would be replaced by a new one, in which case the right of recovery was denied.

Corcoran vs. Milwaukee Gas-Light Company, 51 N. W. 328, in which the servant amply proved a defect in the ladder through which he was injured, a notification to the master of such defect, a promise of the master to put spikes on the ladder, the reliance on such promise by the servant and his subsequent injury, and yet the sustaining of a demurrer to the complaint upon the ground that it failed to state a cause of action for the reason that the danger from the use of the ladder might have been anticipated by the exercise of ordinary care on the part of the servant, was on appeal held to be proper.

And in Kistner vs. American Steel Foundries, 84 N. E. 44, the rule is stated as follows:

> "The rule which exempts an employe from assuming the risk of injury because of defective machinery, where a promise of repair is made, applies only where particular skill and experience are necessary to appreciate the defect and the danger, or where he can have but little knowledge of the machinery, and does not apply where he is engaged in ordinary labor or the tools used are of simple construction with which he is as familiar as the master."

To the same effect are the following authorities:

McGill vs. Cleveland & S. W. Traction Co., 86 N. E. 989.

Stirling Coal & Coke Co. vs. Fork, 131 S. W. 1030.

Spencer vs. Worthington, 60 N. Y. Supp. 873

Dauche Iron Works vs. Nevin, 134 Ill. App. 475.

And in Gowen vs. Harley, 56 Fed. 982, after stating the law to be that a servant engaged in the performance of a simple act of manual labor the risks of which are obvious can not escape from assuming the risks thereof by proof that the master promised to furnish him tools by which his work could be done more safely, the court illustrates the application of this doctrine in the following manner:

> "The errand boy whose duty it is to climb the stairs in a high building daily can not recover of his employer for a fall down the stairs on the ground that the latter had just promised to furnish him an elevator for his convenience or for his safety when the stairs themselves are reasonably safe. The mason who is placing heavy stones upon a wall by hand can not recover of his employer if he takes up one that is too heavy for him and it falls upon his feet, on the ground that his employer had just promised to furnish him an inclined plane upon which he could roll stones upon the wall." (Bottom of page 982).

And again:

> "The rule that the master is responsible for damages resulting to a servant from defects in machinery and appliances of which the servant has notified him and which he has promised to repair governs cases in which machinery or tools that are used in the work are discovered to be dangerously defective while in use and to cases in which tools or machinery are necessary for the safe performance of the work.

It has no application to a case where the services required is simple manual labor without tools or machinery and where no such tools or appliances are necessary to the performance of the work with a reasonable degree of safety." (Top of page 983).

VII. THE FAILURE TO REPLACE OR REPAIR THE LADDER IN QUESTION WAS NOT THE PROXIMATE CAUSE OF PLAINTIFF'S INJURY.

If it be admitted in this case that there was a defective or broken ladder between the second and third floors; that this condition had become known to the master by reason of a notification or complaint made to it by a servant, and if it is also admitted that the master promised to replace or repair such ladder, still the employee did not receive his injuries in trying to use the defective or broken ladder or in trying to go that way, but on the contrary he selected the most dangerous way there was, namely the plank, whereas the other manway was available to him and he might have sent his drill down the timber slide. The alleged promise to repair or replace this ladder, if indeed any such promise was made, was directed toward the ladder in the east manway and not toward the plank upon which the plaintiff was injured. There is no evidence in this case which brings home to the defendant a knowledge of the existence or use of this plank until after the accident to the plaintiff. Shaw testified that he did not know of its existence and this evidence is uncontradicted. (120). We have not lost sight of the testimony which we have quoted concerning the conversation between Shaw and the plaintiff, but it will be no-

ticed that the plaintiff did not at that time, and does not now claim that he did at any time notify Shaw of the existence or use of this plank. He merely stated that he had to get up to his place of work over the timbers like a rabbit. Shaw, on the other hand, flatly denies any knowledge of the existence of this plank, and also denies this conversation. (130).

It was the proof of this fact, i. e. that the shift boss, Shaw, even admitting plaintiff's testimony as to his conversation with Shaw to be true, had promised merely to replace a ladder in the east manway, while the plaintiff's injury was due to the use of a plank, the very existence of which was unknown to the master, and which was located many feet away from this broken ladder, that caused the trial court to hesitate as to whether or not he would send this case to the jury. (178).

The alleged promise to replace this ladder had absolutely nothing to do, one way or the other, with plaintiff's injury suffered by reason of falling from the plank as he did. The broken ladder, or the promise, if there was one, to replace the same, was not the proximate cause of plaintiff's injury.

VIII. THE PLAINTIFF WAS GUILTY OF CONTRIBUTORY NEGLIGENCE.

The proof in this case utterly fails to bring plaintiff within the exception which allows a recovery even though the plaintiff has been negligent, if he was relying on a promise to repair. Upon this point the evidence shows that there was open to the plaintiff a way of egress

through the west manway which was readily accessible, but only forty-five feet (173) from the place where the plaintiff was working; that this was the usual and customary way of egress (125), and that upon the night of the accident there was nothing but the plaintiff's own choice to prevent him from using that way of reaching the sill floor with his machine. (122).

The plaintiff's contention in this connection was based upon the theory that upon the night of the accident access to this west manway and the timber slide was blocked. But the plaintiff himself in his testimony (179) did not say positively that either the ore chute or whatever muck may have been near the same would have prevented him from going to th west manway ON THE NIGHT OF THE ACCIDENT. Plaintiff merely makes the general statement that "there was no chance to get by." (79). In fact, the evidence clearly shows that neither the plaintiff nor his witness, Holmi, had attempted to ascertain for themselves on the night before the accident or on the night of the accident whether or not they could ascend and descend by means of the west manway, or whether or not they could pass by the timber slide, ore chute and inclined chute on the third floor. Although they knew of the existence of this west manway, and both had used it in the past, on finding the ladder broken in the east manway, they voluntarily and purely from choice commenced the use of this plank, leading almost to the suspicion that one of them placed the plank in the position it was on the night of the accident, and never thereafter did they attempt to ascertain whether it was feasible to use the west manway. They do not know that it could not be used—

they merely speculate that it was not a practicable way to go up and down between the floors. On the other hand, we have the testimony of Shaw (122) where it was shown that there was between two feet and two and one-half feet of open passage way between the slide chute and th wall and this evidence is corroborated by Lamberton (150) by Pellecier (160) and by Ashland (168) and both Shaw and Lamberton's testimony relates to the facts as they existed on the night of plaintiff's accident (128-150). Shaw dissipates any contention of the plaintiff that the way to the west manway, under the ore chute was dangerous. (143). Shaw also testified, and his testimony is uncontradicted by any evidence or any inference, that upon the night of the accident there was no muck between the slide chute and the wall. Even the plaintiff's own witness, Holmi, testified that by stooping or bending slightly there was no difficulty in using the passage way between the slide chute and the wall. (68).

And the defendant also provided a safe way in which the plaintiff could have lowered the machine, which he from choice carried with him that night from the place where he was working to the sill floor. It is shown that he could have used the timber slide which was provided with a windlass (127) and further than this there is direct evidence, uncontradicted, that instructions had been given miners employed in the defendant's mine, that machines should be taken up and lowered by way of the timber slide. (128).

Plaintiff knew of the existence of the timber slide and that it was provided with a windlass to be used in tak-

ing machines up and down (92); he also knew of the west manway (90); and had used it many times (97). It is amply established by the evidence that a man carrying a machine such as the one which the plaintiff was using could have easily passed between the slide chute and the wall and then had open to him both the timber slide and the west manyway (152-160); the two ways, and only two ways, which the defendant had authorized its employees to use as passage ways and in raising and lowering their machines.

The plaintiff relies strongly upon the contention that the east manway was not in a condition to be used as a passage way. This has no bearing at all upon the case for (at Tr. p. 112) Mr. Carey testified that the east manway was not a permanent manway and this is undisputed, and (at Tr. 146) Mr. Shaw testified that the east manway was only for the convenience of the chute and not for the miners to use. Instead, however, of sending down his machine by means of the timber slide and himself descending through the west manway the plaintiff, purely from choice, elected to carry his machine which weighed 75 pounds (93) and to walk over this eight-inch plank, which had a fall in six feet of between two and one-half and three feet—indeed a dangerous angle—and beneath which was an opening twenty feet or more in depth.

There is involved then in this case the question of whether plaintiff can recover for an injury occurring to him in electing to use the more hazardous one of two ways of performing an act, and the courts have held that this

choice of the more hazardous way acts as an absolute bar to the plaintiff's recovery, being considered as contributory negligence on the part of the plaintiff. This principle of law is best illustrated and applied in the case of Gilbert v. Burlington C. R. & N. Company, 128 Fed. 531, in which the plaintiff, a switchman, in a railway yard was injured in uncoupling switching freight cars. The cars were equipped with a safety coupling device which the plaintiff attempted to use but which failed to work. The court found from the evidence that there were two ways then open to the plaintiff of performing his work, the safer one to go around the end of the car and operate the coupling lever from the other side, while the hazardous way, and the one which the plaintiff took, was to step in between the cars and lift the pin. Upon this state of facts the court held: "The act of placing himself between the ends of the cars to uncouple them, without first endeavoring to do so by the use of the lever on the opposite side, was an act of negligence because the use of that lever was a less dangerous method of separating the cars. Where there is a comparatively safe and a more dangerous way known to a servant by means of which he may discharge his duty, it is a want of ordinary care for him to select and use the more dangerous method. Morris v. Duluth S. S. & A. Ry. Co., 108 Fed. 747, 749, 47 C. C. A. 661-664; Gowen v. Harley, 56 Fed. 973, 983, 6 C. C. A. 190, 200; Coal Co. v. Reid, 85 Fed. 914, 29 C. C. A. 475; McCain v. Railroad Co., 76 Fed. 125, 126, 22 C. C. A. 99, 101; Russell v. Tillotson, 140 Mass. 201, 4 N. E. 231; Gleason v. Railway Co., 73 Fed. 647, 19 C. C. A. 636; Cunningham v. Railway Co. (C. C.) 17 Fed. 882;

English v. Railway Co. (C. C.) 24 Fed. 906.

Regarding his contributory negligence the court also said, "One whose negligence directly contributed to his injury cannot recover damages of another whose negligense concurred to cause it, although the carelessness of the latter was the more proximate cause of it. Pyle vs. Clark, 25 C. C. A. 190, 192, 79 Fed. 744, 746, 747; Motey v. Granite Co. 20 C. C. A. 366, 369, 74 Fed. 156, 159; Chicago & N. W. Ry. Co. v. Davis, 3 C. C. A. 429, 431, 53 Fed. 61, 63; Railway Co. vs. Moseley, 6 C. C. A. 641, 643, 646, 57 Fed. 921, 923, 925; Reynolds v. Railway Co. 16 C. C. A. 435, 69 Fed. 808, 811; Schofield v. Railway Co., 114 U. S. 615, 618, 5 Sup. Ct. 1125, 29 L. Ed. 224; Railroad Co. v. Houston, 95 U. S. 697, 702, 24 L. Ed. 542; Hayden v. Railway Co. 124 Mo. 556, 573, 28 S. W. 74; Wilcox v. Railway Co., 39 N. Y. 358, 100 Am. Dec. 440.

There was a contention in the case at bar that the plaintiff was justified in using the passageway which he did use upon the ground that it was customary for those employed with him to use this same means. In Gilbert v. Burlington, etc., supra, the court, in discussing this same contention states: "If a man exposes himself to a risk unnecessarily he is guilty of negligence, although it be shown that other persons have done the same thing and escaped unhurt. The inherent quality of an act is not changed whether done by one or many. (Citing Dawson v. Chicago R. I. & P. R. Co., 114 Fed. 870). The danger of entering and walking between the moving cars was so imminent and obvious that no custom to do so unnecessarily could deprive the act of its inherently negligent

character. (Gilbert v. Burlington etc., 128 Fed. 535).

There is no evidence anywhere that any other employee there ever attempted to carry anything over the plank and no one else was ever so grossly negligent and careless as to attempt to carry a 75-pound drill over this plank, sloping as it was at an angle of over 30 degrees.

In the case of King v. Woodward Iron Company (Alabama), 59 Southern 264, the plaintiff elected to leave the mine by a tramway when there had been provided for his use a manway, and while leaving the mine over this tramway the plaintiff was struck by a car and killed. While the facts of that case show that the plaintiff had been warned not to use this particular tramway and instructed to use the manway, yet the court, in deciding the case, did not base its opinion wholly upon this positive violation by the plaintiff of his instructions and upon his failure to give heed to the warnings of the defendant, but states the general principle of law to be, "The plea clearly and certainly alleges that the intestate voluntarily selected this tramway, which was dangerous, when he knew there was a manway which was safe. This was negligence, voluntarily assumed—Knowing that one was safe and the other dangerous it was certainly negligence to select the dangerous way."

Where there is a natural and safe method of performing his service, and the servant carelessly pursues the method that is obviously more dangerous, he is guilty of contributory negligence and cannot recover.

Gowen v. Harley 56 Fed. 983.

Russell v. Tillotson 140 Mass. 201.

And if it be assumed that the use of this plank was dangerous, and that the danger of walking over the same was known to both master and servant, then even though the master had agreed to remove the danger the servant must use such degree of care as is commensurate with the increased danger; and in fact must use a greater degree of care than he would in a case where he did not know of the danger.

Williams Cooperage Company v. Headrick, 159 Fed. 680.

Trudeau v. American Mill Co. 83 Pac. 725.

Considering now briefly the other Specifications of Error, and first, assignments number II and III, which are to the refusal of the court to give certain instructions requested by the defendant.

The first of these instructions was to the effect that if the jury found that the defendant had provided a safe way for the plaintiff to use in passing between the different floors, and that the plaintiff voluntarily chose a more dangerous way, and was injured while using this dangerous way that he could not recover, even though the master had agreed to provide another passageway for his use. This is the effect of the decision in Gowen v. Harley, supra, and expresses the rule of law as we understand it.

The second requested instruction was upon the question of assumption of risk and clearly states the law.

And the failure to give these two instructions was not cured by the court covering these questions in its oral charge.

Specification of Error Number V has particular reference to the use of an illustration by the court in its oral charge, in which the court stated to the jury that if one of them, being a farmer, gave to his employee an axe or pitchfork with a cracked handle, and the employee knowing nothing about the defect, uses the device and is injured, then the employer is responsible. We believe that this illustration and this portion of the charge to the jury was erroneous and misleading for the reason that it leaves out of consideration that element of knowledge which must be common to all sane people of ordinary understanding with reference to certain agents and instrumentalities, especially of such simple construction as an axe or a pitchfork, and that an employee cannot shut his eyes and go about his work, and then in case of injury claim that he did not know of the defect which should have been obvious to him. The illustration given by the court failed to call the jury's attention to the fact that in order to hold the farmer liable for an injury such as that supposed by the court that it would have to be shown that the farmer knew the tool was defective or had a latent danger or defect in it, which was not known to the servant, and which the servant had no reasonable means of ascertaining. And it seems inconceivable that a jury would not be misled by an illustration of this kind, where they were advised that for an injury occurring to the servant from the use of a simple axe or pitchfork which had a cracked handle the employer would be re-

sponsible; and this irrespective of the exercise of ordinary care on the part of the servant. This instruction, in the form given by the court in the illustration, certainly does not state the law.

An exception has also been saved, Specification number VI, to that portion of the court's oral charge which advised the jury in effect that the plaintiff could recover if the negligence of the defendant contributed to or caused the accident. We do not understand the law to be that where the negligence of the master, in connection with other facts, contributes to a servant's injury that the servant can recover. We understand the rule to be that he negligence of the master must have been the primary or proximate cause of the servant's injury in order for him to have a right to recovery.

We have heretofore in this brief suggested to this court that there was an entire lack of evidence in this case to show that the broken ladder between the second and third floors in the East manway was the proximate cause of the plaintiff's injury, and in a case where this question was directly raised, we think the instruction of the Court was entirely misleading.

In conclusion we would ask this court to bear in mind at all times in its consideration of this appeal that the plaintiff was not a young and inexperienced employee, whom it was the duty of the master to warn of any defects or dangers, but was an old, experienced miner,—experienced by his labors in other mines as well as in the defendant's. He was entirely familiar with his work, his

surroundings, and the ways provided by the master for him to use in going to and from his work. His knowledge of the place wherein he worked and of the ways provided for going to and from that work, was far superior to that of the master himself. He was one of the first men to ascertain the fact of a ladder being broken in the East manway and one of the first, if not the first, of the servants to find and use this plank in lieu of a ladder. He used it uncomplainingly for several days before his accident, and when finally a chance meeting with the shift boss, and the latter's reference to the difficulty in getting up to the fourth floor caused the plaintiff to himself remark of the inconvenient way which he had of going to and from his work, he did not even then complain of any danger which he anticipated in going to and from his work, nor ask or receive a promise from the master to remove any such anticipated danger; he merely suggested a more convenient way which might be provided by the master. Nor was there anything from which the jury could infer that the plaintiff anticipated any danger attendant upon his going to and from his work over this plank, nor that he intended to quit if the broken ladder was not replaced, nor that he continued to work relying on a promise to replace this ladder as the inducement for such continuance in the defendant's employ. We respectfully urge that in the light of all the evidence in this case the trial court should have directed a verdict in favor of the defendant.

Respectfully submitted,

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